

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 03 July 2003

BALCA Case No.: 2002-INA-140
ETA Case No.: P1998-CA-09437075/ML

In the Matter of:

MOUNTAIN VIEW ESTATES,
Employer,

on behalf of

LAURA AGUILAR,
Alien.

Appearance: Evelyn Sineneng-Smith, JD
San Jose, California

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of "nurse assistant."¹ The CO denied the application and Employer requested review pursuant to 20 C.F.R. §656.26.

¹ Permanent alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification and Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On December 19, 1997, Mountain View Estates ("Employer") filed an application for labor certification to enable Laura Aguilar ("Alien") to fill the position of "uncertified nurse assistant." (AF 62). No education or years of experience were required. The job duties were described as follows:

Clean house (11) rooms: assist (6) frail elderly ages 60 & up with Alzheimer's Disease, diabetic, hypertension, cancer, stroke victims. Kidney disease, incontinent, wheelchair bound; disabled, blind, deaf. Assist with shower, bed bath, sponge bath, tub bath, ambulating, exercising, shaving, assist with medications, provide hair care, mouth care, bowel care, skin care, personal hygiene (clean the body of dirt, feces, urine), vacuum, wash dishes, wash-iron-dry clothes and linens, handwash soft clothes; straighten rooms, change diapers, empty urine bags when necessary, clean up mess and make beds; prepare and serve meals, snacks; heavy lifting required for wheelchair bound and those with walkers and canes. Inspect all health hazards, furniture and equipment. Watch signs of physical, emotional health, depression, fear, anger, cuts, bruises and sores. May wake up at night for toilet needs, empty commodes. Reposition residents on their sides to avoid sores and skin irritations. Report any unusual, uncommon behavior to licensee, social worker, doctor, psychologist.

The CO issued a Notice of Findings ("NOF") on May 11, 2001, proposing to deny certification.² (AF 56). The CO found that the license submitted by Employer was over five years old, raising a question as to whether Employer had a current job opening, operated an ongoing business and/or could provide permanent full-time employment to which U.S. workers could be referred. Employer was directed to document its ability to provide permanent, full-time employment to a U.S. worker under the terms stated on its ETA750A. Part of the documentation required was a copy of Employer's business license and state and federal income and business tax returns.

²Those issues which were resolved prior to issuance of the Final Determination will not be set forth herein.

After corrective action was taken by Employer, the CO issued a Supplemental NOF (“SNOF”) on September 20, 2001, wherein it was noted that the rebuttal provided regarding the issue of a job open to U.S. workers raised a new issue regarding whether there actually was an opening for a nurse assistant. (AF 21). Thus, the Dictionary of Occupational Titles (“DOT”) provides that a nurse assistant works “under direction of nursing and medical staff,” yet Employer’s position was being supervised by “owner/licensee” who did not appear to qualify as nursing or medical staff. The CO again questioned whether Employer had an opening for a nurse assistant.

The CO also found that the position at issue was an occupation which was on the Schedule B list of non-certifiable occupations. This required Employer to obtain a Schedule B waiver. Employer was advised that it could petition for a Schedule B waiver, and that waiver documentation “shall include documentary verification from the local job service office that you had a suppressed job order on file with the local office for a period of 30 calendar days and that you were unable to obtain a qualified U.S. worker.”

On October 22, 2001, Employer’s owner signed a petition for a Schedule B waiver. (AF 20). Employer’s owner also stated its willingness to re-advertise the position with the language “will compensate in accordance with CA State law and regulations,” and explained that there were two types of nurse assistant: a certified nurse assistant who worked under the direction of nursing and medical staff; and an uncertified nurse assistant who was normally supervised by the owner/licensee or administrator of a residential care home, and who is not working as a nurse (but may be a nurse professionally) or is not a medical staffer. (AF 18).

A Final Determination was issued on December 28, 2001, denying certification. (AF 15). The CO rejected Employer’s rebuttal that certified nurse assistants are supervised but uncertified nurse assistants were not, as ineffective rebuttal, because no authority was given for the assertion. The CO noted that since Employer had not contested the SNOF assertion that the owner/licensee had not demonstrated nursing or medical training, Employer’s opinion alone could not adequately address this finding. Absent convincing documentation that the position did not need to be under the supervision

as set out in the DOT, it could not be concluded that there was a bona-fide job offer to which U.S. workers could be referred. The CO further found that Employer's rebuttal that it had not received any referrals from EDD was not sufficient to establish Employer's right to a Schedule B waiver. Employer had been directed to test the labor market through a suppressed CalJOBS order, which it did not do.

On January 31, 2002, Employer requested review of the denial of certification by the Board of Alien Labor Certification Appeals ("Board" or "BALCA"). (AF 01).

DISCUSSION

With its request for review, Employer's owner again reiterates that uncertified nurse assistants are normally supervised by the owner/ licensee or administrator of a residential care home, and includes for the first time, a section of the California-DSS- Manual-CLL to support its argument. With regard to the Schedule B issue, Employer states that it was advised by an employee of the EDD that every request for labor certification is automatically processed for "suppressed CalJobs order," and that Employer had no access to the details of this information, but had "full trust and confidence in the Department."

The requirements of a bona fide job opportunity arise out of 20 C.F.R. §656.20(c)(8), which requires that an employer attest that the "job opportunity has been and is clearly open to any qualified U.S. worker." *Pasadena Typewriter and Adding Machine Co. Inc. and Alirez Rahmaty v. United States Department of Labor*, No. CV 83-5516-AABT (C.D. Cal. 1987).

In the instant case, Employer advertised for a nurse assistant, specifying that the position is uncertified. Employer was then advised that the DOT description of that position indicates that a requirement of that position is that the position be performed under "direction of nursing and medical staff." When requested to provide rebuttal that there was such a position available, Employer responded by claiming that there is a difference between certified and uncertified nurse assistants, the

former being supervised by nursing and medical staff, the latter not. No authority has been provided for this assertion on the part of Employer. More significantly, the assertion runs contrary to the DOT. Employer has failed to provide the documentation necessary to establish a bona fide job opportunity for a nurse assistant. Thus, just as in *Mega Nursing Services, Inc.*, 1993-INA-105 (Jul. 13 1994)(*dec. on recon.*), where the panel stated, “where the CO reasonably determines that the job duties match a DOT description which requires licensing, the [e]mployer hears the burden of proof on rebuttal, that a license is not required.” Here, it was determined that the job required that it be performed under direction of nursing and medical staff. It was incumbent upon Employer to establish otherwise. Employer failed to do so. This being the case, the remaining issues need not be addressed. Labor certification was properly denied, and the following order shall issue.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board
of Alien Labor Certification Appeals

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions

for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400 North
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.